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In the Supreme Court of the United States

OCTOBER TERM, 1991

GREENVILLE PUBLIC SCHOOL DISTRICT, ET AL.,
PETITIONERS

v.

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the state court had jurisdiction over the claim that the statute at issue in this case had not been precleared under Section 5 of the Voting Rights Act.

2. Whether, under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, the Attorney General's preclearance of voting changes identified in a submission by a covered jurisdiction operates to preclear other changes made by the same legislation but not specifically identified in the submission.

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This submission responds to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.[1]

STATEMENT

This case arises from the enactment by the State of Mississippi of a comprehensive revision to its education laws, which, *inter alia*, both repealed a former provision governing the modification of school district boundaries when territory is annexed by a city and enacted a new provision generally governing alterations of school district boundaries. The question presented is whether the repeal of the former provision was precleared pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c.

[1] In response to the Court's invitation, we are today filing a brief expressing the views of the United States in *Dupree* v. *Moore*, No. 90-1977. That case presents the same substantive question as does the instant case, but does not present the jurisdictional question presented here. We have provided the parties in this case with a copy of our brief in No. 90-1977.

1. Mississippi cities are permitted by Miss. Code Ann. §§ 21-1-29 *et seq.* (1990), to annex territory located outside their boundaries by filing a petition in chancery court. Prior to 1986, the status of city school districts, in the event of such a municipal expansion, was governed by Miss. Code Ann. § 37-7-611 (1972). Pet. App. 109a-111a. Under Section 37-7-611, when a city annexed territory, the municipal school district automatically expanded to become coextensive with the city limits. In addition to this provision for automatic expansion of municipal school district boundaries, Section 37-7-611 and other provisions of Mississippi law also provided for alteration of municipal school district boundaries with the consent of the school boards involved.[2] The school board of a municipal school district is generally chosen by the city's elected governing body. Miss. Code Ann. § 37-7-203 (1990).[3]

2. In 1986, the State legislature enacted the Uniform School Law, S.B. No. 2117, ch. 492, omnibus legislation revising the entire state education code. Among the many changes effected by this bill, Section 47 specifically repealed Section 37-7-611—the statute that provided for automatic incorporation of annexed territory into municipal school districts—as well as 22 other provisions of state law. Pet. App. 75a. In

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[2] Counties were treated differently from cities under Mississippi law. Prior to 1986, non-municipal school district boundaries could be altered by action of county boards of education, with the approval of a state education commission. See Miss. Code Ann. §§ 37-7-103, 37-7-113 (1972); Pet. App. 76a-77a, 87a-88a.

[3] Where the municipal school district includes territory outside the city limits, Mississippi law permits one or two extra school board members to be elected by the residents of the added territory, the number depending upon the proportion of the pupils accounted for by the added territory. Miss. Code Ann. § 37-7-203 (1990). Members of non-municipal school

addition, Section 52 of the Uniform School Law amended Miss Code Ann. § 37-7-103 (1972) to give the board of each school district—municipal or otherwise—authority to alter its boundaries, with the consent of any neighboring school board whose district boundaries would be affected by the change. Pet. App. 76a-77a. One of the effects of the repeal of Section 37-7-611 and the amendment of Section 37-7-103 was that, when a city now annexed neighboring territory, the municipal school district would expand into the annexed territory only with the consent of the school board governing that territory.

3. On July 22, 1986, the State of Mississippi sent the Uniform School Law to the Attorney General for preclearance under Section 5. Pet. App. 32a-46a. The State's submission included a letter from the state attorney general stating that the " 'Mississippi Uniform School Law of 1986' * * * is submitted * * * in its entirety." Pet. App. 35a. The letter continued: "For the sake of brevity, the submission will only set forth the particular sections which deal primarily with voting rights even though the complete act is submitted for review." *Ibid.*

Section 51.25(b) of the regulations governing Section 5 submissions provides that "[i]f the change affecting voting is not readily apparent on the face of the document provided * * * or is not embodied in a document," the submission must contain "a clear statement of the change explaining the difference between the submitted change and the prior law or practice, or explanatory materials adequate to disclose to the Attorney General the difference between the prior and proposed situation with respect to vot-

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boards are generally elected by county voters. Miss. Code Ann. § 37-7-207 (1990).

ing." 28 C.F.R. 51.25(b) (1986), Pet. App. 180a.[4] Accordingly, in a portion of the submission letter headed "28 C.F.R. 51.25(b)," the State specifically described 13 of the 205 sections of the bill. Pet. App. 35a-41a.

Section 47 of the bill, which repealed Section 37-7-611, was not specifically described in the submission letter. The submission letter thus did not state that pre-existing law provided for automatic expansion of municipal school districts when a city annexed adjoining territory, nor did it address the effect of the Uniform School Law on such automatic, non-consensual expansions.

Section 52 of the bill was among the 13 sections specifically described. The submission letter stated that Section 52 provides that "the school board of any school district may * * * alter the boundaries of any such district" or "with the consent of the school board of the district involved may add to [its] school district any part of the school district adjoining same or may detach territory from such school district and annex same to an adjoining district." Pet. App. 37a. The submission letter explained that, under pre-existing law, a county board of education could "create, alter or abolish any school districts of such county, other than the municipal separate school districts." Pet. App. 37a. Where a municipal school district was involved, the letter added that, under pre-existing law, "the county board of education with the consent of the board of trustees of the municipal separate school district involved may add to such municipal separate school districts any part of the county adjoining same." *Ibid.* The explanation of Section 52 thus explained the previous method for consensual expansion of municipal school districts,

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[4] Substantially the same instructions have been in effect as guidelines since 1971. See 36 Fed. Reg. 18,186-18,190 (1971).

but did not mention the previous method for automatic expansion of municipal school district boundaries when the municipality annexes territory.

In addition to the letter, the State also included with its submission a certified copy of the bill and a looseleaf notebook entitled "Senate Bill Number 2117 —Comparison of Current Law and New Law." Pet. App. 47a-108a (notebook); see Pet. App. 35a. The 467-page notebook contained the text of each provision of the Uniform School Law, together with photocopied pages containing provisions of prior state law, if any, that were amended by that provision. The text of Section 47 appeared in the enclosed bill and in the notebook, but the texts of the 23 provisions of law repealed by Section 47 were not included in the notebook. The text of Section 47 simply states that 23 cited provisions of state law—including Section 37-7-611—that "provide for the creation and operation of municipal separate school districts" are repealed. Pet. App. 75a.

On August 29, 1986, the State was informed by letter that the Atorney General of the United States did "not interpose any objection to the voting changes occasioned by Senate Bill No. 2117 (1986) as identified in your July 22, 1986, letter." Pet. App. 112a.

4. On December 30, 1987, the State sent the Attorney General of the United States a new document entitled "Submission of Chapter 492, Section 47: [Miss. Code Ann. § 37-7-611 (1972)] of the 1986 Laws of Mississippi." Pet. App. 114a (brackets in original). That submission noted that "[t]he major part of Chapter 492, as it deals with the Voting Rights Act of 1965 * * * has already been precleared by the United States Justice Department on August 29, 1986." Pet. App. 117a.[5] The submission

[5] The 1987 submission letter—like the 1986 submission—included the boilerplate statements that "in making this sub-

went on to explain that Section 47 repeals Section 37-7-611, and to outline the nature of that change. Distinguishing Section 47 from Section 52, the submission noted:

> It is the automatic expansion of the school district which had been repealed by [Section 47]. The option to expand, however, is not forclosed [*sic*]. Section 52, of the Chapter 492 of the 1986 Laws of Mississippi (precleared by the United States Justice Department on August 29, 1986) provides that the school board of any school district may abolish such existing district or reorganize, change or alter the boundaries of any such school district.

Pet. App. 120a. On February 28, 1988, the Attorney General requested additional information with regard to the submission of Section 47. Pet. App. 125a-129a. The State responded almost a year later, by letter of January 27, 1989. Pet. App. 130a-138a.[6]

On March 31, 1989, the Attorney General interposed an objection to Section 47. Pet. App. 139a-142a. The Attorney General concluded that repealing the automatic annexation provision in Section 37-7-611 would be likely to "create a class of city voters (for the most part predominantly white) who will not reside in the city school system yet may vote for the city governing body which, under Mississippi

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mission the State of Mississippi hereby expressly reserves and does not waive any and all objections it may have concerning whether the instant submission is subject to the preclearance requirements of Section 5." Pet. App. 116a; see Pet. App. 34a. The first time the State specifically acknowledged any uncertainty surrounding the Section 5 status of Section 47 appears to have been in the State's request for reconsideration submitted to the Attorney General in January 1990. See p. 7, *infra*.

[6] This letter again acknowledged that the Attorney General had precleared in 1986 the "particular sections identified in our July 22, 1986 submission." Pet. App. 130a.

law, appoints the city school board." Pet. App. 141a. The Attorney General noted that the State had provided "no explanation for the establishment of such a political system which appears not only to have the potential to impact negatively on the influence of minority city school district residents but also to treat black voters differently than white voters." *Ibid.*

5. On January 12, 1990, the State formally requested the Attorney General to reconsider his objection. Pet. App. 143a-172a. In the request, the State contended for the first time that the entire 1986 statute had actually been submitted and precleared in 1986, and that the Attorney General lacked "authority * * * to grant limited preclearance" of a law "submitted in its entirety." Pet. App. 149a. The State claimed that, "[w]ith respect to Section 47, even though the repealed sections were not set out, they were sufficiently described as providing for the creation and operation of municipal separate school districts," Pet. App. 148a, and that the Attorney General's failure to object to Section 47 in August 1986 accordingly amounted to preclearance of that provision. Pet. App. 149a.

The State was advised by letter on May 25, 1990, that the Attorney General would not withdraw the objection. Pet. App. 173a-177a. In response to the State's contention that the change had necessarily been precleared in 1986, the letter noted relevant case law and stated:

> Section 5, as interpreted by the courts and our submission guidelines, plainly fixed the responsibility for identifying voting changes on the state, not the United States Attorney General, yet the state appears to be arguing * * * that the Attorney General should have uncovered voting changes of which the state itself seemingly was unaware at the time the prior submissions were made.

Pet. App. 175a.[7]

6. In 1982, the City of Greenville petitioned the state chancery court to annex approximately 19 square miles of territory. The annexation was finally approved by the Mississippi Supreme Court in 1987. Pet. App. 28a-29a. A portion of the annexed area had been part of the Western Line Consolidated School District. Pet. App. 29a. Under Section 37-7-611, the annexation would automatically extend the boundaries of the City's school district to include the annexed territory.

In February 1988, petitioners, the Greenville Public School District and its five board members, filed this suit for declaratory relief in the Circuit Court for Washington County, Mississippi. Named as defendants were the Western Line Consolidated School District and the members of its board of trustees in their official capacities. Pet. App. 27a. The complaint alleged that Section 37-7-611 governed the expansion of a municipal school district when a city annexed territory, because the repeal of Section 37-7-611 by Section 47 of the Uniform School Law had never been precleared under Section 5 of the Voting Rights Act. Pet. App. 29a. Accordingly, petitioners sought declarations that:

> a. The repeal of Section 37-7-611 of the Mississippi Code of 1972 by Section 47 of the Uni-

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[7] The letter also cited, without discussing, 28 C.F.R. 51.26(d) and 51.27, as in accord with the "well-established" requirement that a voting change must be submitted in an "unambiguous and recordable manner." Pet. App. 174a. 28 C.F.R. 51.27 provides that a copy of any repealed statute should be included with a Section 5 submission of the repealing legislation. That specific regulation was not in effect at the time of the State's submission of the Uniform School Law in 1986. See 28 C.F.R. 51.1 *et seq.* (1986). The regulations in effect in 1986 did, however, require the submitting jurisdiction to identify with specificity the voting changes for which preclearance was sought. 28 C.F.R. 51.25(b); see pp. 3-4, *supra*.

> form School Law is void and of no effect until it has been precleared by the Attorney General of the United States.
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> b. Section 37-7-103 of the Mississippi Code of 1972, as amended [by Section 52 of the Uniform School Law], is not in conflict with Section 37-7-611.

Pet. App. 31a.

The trial court granted respondents' motion for summary judgment, on the ground that it had no jurisdiction to decide petitioners' Section 5 claim. Pet. App. 24a-26a. The court held that "[e]xclusive jurisdiction of matters within the ambit of the Voting Rights [Act] of 1965 is vested in the United States District Court for the District of Columbia and/or the Attorney General of the United States, and this Court has no jurisdiction to rule in these areas." Pet. App. 25a.

6. On December 12, 1990, the Mississippi Supreme Court reversed. Pet. App. 1a-21a. The court held that it had concurrent jurisdiction with local, three-judge federal district courts to determine whether the repeal of Section 37-7-611 had been precleared pursuant to Section 5 of the Voting Rights Act. Pet. App. 5a-7a. The court noted "the presumption of concurrent jurisdiction," and referred to the fact that "[s]tate courts have inherent authority, and are presumptively competent, to adjudicate claims arising under the laws of the United States." Pet. App. 5a (citing *Yellow Freight Sys., Inc.* v. *Donnelly*, 110 S. Ct. 1566 (1990); *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473 (1981); *Claflin* v. *Houseman*, 93 U.S. 130, 136-137 (1876)). But the court also referred to its authority to decide issues concerning the interpretation of federal statutes that arise collaterally, even where decision of claims arising under those statutes is entrusted ex-

clusively to the federal courts. Pet. App. 5a (citing *Hathorn* v. *Lovorn*, 457 U.S. 255, 266 (1982)). The court thus did not expressly state whether it viewed the Section 5 claim in this case to be collateral to a state-law claim.

Turning to the merits, the court held that the Attorney General had in effect precleared the repeal of Section 37-7-611 when he precleared Section 52 of the Uniform School Law, the section providing that any school district may alter its boundaries with consent of the school board of any other affected school district. Pet. App. 7a-21a. According to the court, "[e]ven assuming § 37-7-611 was not specifically repealed [by Section 47 of the Uniform School Law], it was implicitly repealed by [Section 52]." Pet. App. 14a. In the court's view, Section 52 was "a subsequent enactment covering a field of operation co-existent with [Section 37-7-611]" that "cannot by any reasonable construction be given effect while the prior law remains in existence because of irreconcilable conflict between the two acts." Pet. App. 14a. In such a situation, the court held that a "repeal * * * arise[s] by necessary implication from the enactment of a subsequent act." *Ibid.* In reaching its conclusion, the court did not purport to rely on any indication that the submission of the Uniform School Law had informed the Attorney General, at the time of the preclearance of Section 52, that Mississippi law had previously provided for automatic expansion of a municipal school district when a municipality annexed territory, nor that such provisions for automatic expansion had been repealed expressly by Section 47 or impliedly by Section 52 of the Uniform School Law.[8]

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[8] Subsequent to the decision of the Mississippi Supreme Court in this case, on April 2, 1991, the three-judge district

DISCUSSION

The Section 5 "coverage" issue in this case is identical to the issue in *Dupree* v. *Moore*, No. 90-1977, in which a three-judge federal district court used similar reasoning to reach the same conclusion as did the Mississippi Supreme Court here. The decisions in *Dupree* and in this case both were filed prior to this Court's decision in *Clark* v. *Roemer*, 111 S. Ct. 2096 (1991). As explained in our *amicus* submission in *Dupree*, *Clark* reaffirmed principles that are inconsistent with the result and reasoning adopted by the lower courts in both cases. Accordingly, we suggested in *Dupree* that it would be appropriate to vacate the decision below in that case and remand for reconsideration in light of *Clark*.

We do not believe such a disposition would be appropriate in this case, however, because this case presents, in addition to the Section 5 coverage question, a prior issue: whether the Mississippi Supreme Court had jurisdiction over petitioners' Section 5 claim. In our view, there is substantial doubt that the state court decided that question correctly. However, the jurisdictional issue was not litigated by the parties in this case and has not been presented in the petition for certiorari or the brief in opposition. Nor does the Mississippi Supreme Court's jurisdictional holding appear to conflict with any decision of any other state court of last resort or federal three-judge court. Accordingly, it would be appropriate in this case simply to deny the petition for certiorari. As explained below, that disposition would not be likely to control future cases raising the

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court in *Dupree* v. *Moore*, No. 90-1977, see note 1, *supra*, reached the same conclusion, holding that the Attorney General had precleared the 1986 repeal of Section 37-7-611.

same substantive Section 5 issue, on which we believe the Mississippi Supreme Court erred.

1. In *Hathorn* v. *Lovorn*, 457 U.S. 255 (1982), this Court held that a state court cannot refuse to apply Section 5 of the Voting Rights Act when the Section 5 issue arises collaterally in an action brought under state law. The plaintiffs in *Hathorn* originally brought suit in state court in 1975, seeking to enforce a 1964 Mississippi state statute providing for election of boards of trustees of municipal school districts from the county supervisors districts, rather than at-large from the county as a whole. The statute had long been neglected because of doubts about its validity under state law. After the Mississippi Supreme Court decided that the statute, with some excisions, was valid and enforceable as a matter of state law, defendants moved for reconsideration on the ground that it had never been precleared under the Section 5 of the Voting Rights Act and was therefore unenforceable. After further state court proceedings, the Mississippi Supreme Court ordered elections to be held, notwithstanding the fact that the statute had never been precleared. See 457 U.S. at 258-261.

This Court reversed, rejecting the claim that "the Voting Rights Act deprives state courts of the power even to decide whether § 5 applies to a proposed change in voting procedures." 457 U.S. at 265-266. The Court relied on the principal that "even a finding of exclusive federal jursdiction over claims arising under a federal statute usually 'will not prevent a state court from deciding a federal question collaterally.'" 457 U.S. at 266 (quoting *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 483 n.12 (1981)). The Court noted that "[i]t is possible that [Sections 5 and 12(f) of the Voting Rights Act, 42 U.S.C. 1973c, 1973j(f),] grant the federal courts exclusive

jurisdiction over 'action[s] under' § 5 or 'proceedings instituted pursuant' to § 12." 457 U.S. at 267-268. Nonetheless, the Court declined to decide the question whether exclusive jurisdiction over such suits was vested in three-judge federal courts, holding instead that "at least when the issue arises collaterally, state courts may decide whether a proposed change in election procedure requires preclearance under § 5." 457 U.S. at 268.

2. Although *Hathorn* held that state courts may decide Section 5 questions that arise collaterally in state-court actions, this Court has not had occasion to decide whether state courts possess concurrent jurisdiction over a complaint directly raising a Section 5 coverage claim. Nor does the question arise frequently in the lower federal or state courts.

Most of the post-*Hathorn* cases in which state courts have considered Section 5 questions have plainly involved collateral issues and are thus squarely controlled by the holding in *Hathorn*.[9] See, *e.g.*, *Dennis* v. *Pendley*, 518 So. 2d 688 (Ala. 1987) (per curiam) (Section 5 issue in case involving compliance with state-law election requirements); *Harrison* v. *State*, 687 P. 2d 332, 344-346 (Alaska Ct. App. 1984) (defendant in criminal prosecution for violating local liquor ordinance alleged that referendum at which ordi-

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[9] Prior to *Hathorn*, the issue had arisen in only a few cases. See *Wall* v. *Board of Elections*, 250 S.E.2d 408, 412 (Ga. 1978) (challenge on Section 5 and state statutory and constitutional grounds; Section 5 challenge held moot because elections had been precleared); *O'Neal v. Simpson*, 350 So. 2d 998, 1000-1001 (Miss. 1977) (in general challenge to election results on state and federal grounds, court holds that new statute regulating assistance for voters had not been preclared); *Ortiz* v. *Thompson*, 604 S.W.2d 443, 446 (Tex. Civ. App. 1980) (no state court jurisdiction over claims arising under the Voting Rights Act); *Beatty* v. *Esposito*, 411 F. Supp. 107, 111 (E.D.N.Y. 1976) (reaching same conclusion).

nance was passed had not been precleared); *Phillips* v. *State*, 399 S.E. 2d 234, 236-237 (Ga. Ct. App. 1990) (criminal case attacking conviction on ground that judge was elected in violation of Voting Rights Act); *Nomey* v. *Jackson Parish Police Jury*, 343 So. 2d 315, 317-318 (La. Ct. App. 1977) (Section 5 issue arising in suit attacking local election on state law and federal constitutional grounds); *State* v. *Albano*, 722 P. 2d 453, 456 (Haw. 1986) (defendant in criminal prosecution for election fraud alleged that statute under which he was prosecuted had not been precleared).[10]

The only other cases of which we are aware all arose in Mississippi state courts.[11] Since its decision here, the Mississippi Supreme Court has made clear that it believes that it has concurrent jurisdiction

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[10] In *Mitchell* v. *City of Prichard*, 538 So. 2d 1, 2 (Ala. 1988), the court stated the question presented as "whether a state court has subject matter jurisdiction over a case involving the interpretation and application of the federal Voting Rights Act when the issues of the case arise collaterally to a claim brought under state law." Notwithstanding the fact that *Hathorn* answered that question in the affirmative, the Alabama Supreme Court held that "cases involving the interpretation of the preclearance requirements of Section 5 of the federal Voting Rights Act are within the exclusive jurisdiction of the federal courts" and dismissed the case. 538 So. 2d at 2.

[11] In three recent annexation cases, the Mississippi Supreme Court reached the merits, under state law, of the annexation or other subsidiary issue in the case and cited *Hathorn* v. *Lovorn* for the proposition that, "[u]ntil preclearance is forthcoming, [the state court] must enforce the law as it existed before the objected to change." *Harrison County* v. *City of Gulfport*, 557 So. 2d 780, 788 (Miss. 1990); see *In re Enlargement of Corporate Boundaries*, 551 So. 2d 890, 895 (Miss. 1989); *In re Extension of the Boundaries*, 551 So. 2d 861, 868 n.5 (Miss. 1989). See also *Bassett* v. *Town of Taylorsville*, 542 So. 2d 918, 920 n.3 (Miss. 1989); *Sperry Rand Corp.* v. *City of Jackson*, 248 So. 2d 810, 812 (Miss. 1971).

over Section 5 coverage cases. In *Adams County Election Comm'n* v. *Sanders*, 586 So. 2d 829 (Miss. 1991), the plaintiffs sought to enjoin a local primary election on the ground that the redistricting plan under which the election was held had not been precleared.[12] A lower state court granted a preliminary injunction, but the state Supreme Court dissolved it after balancing the equities. With respect to the jurisdictional issue, the court cited its decision in this case for the proposition that "state courts have concurrent jurisdiction with the federal courts to decide whether § 5 of the Voting Rights Act applies to contemplated changes in election procedures." 586 So. 2d at 831.

3. Although neither party raised the jurisdictional issue before this Court, the issue of concurrent state jurisdiction over Section 5 claims that are central to the legal issues in a case—as opposed to being merely collateral to state-law questions—appears to be squarely raised by the facts of this case. The plaintiff sought two declarations: first, that "[t]he repeal of Section 37-7-611 * * * is void and of no effect until it has been precleared by the Attorney General of the United States," and second, that "Section 37-7-103 [Section 52 of the Uniform School Law] * * * is not in conflict with Section 37-7-611." Pet. App. 31a.

The request for the first declaration directly raises the Section 5 coverage issue and appears to involve no question of state law. If that were the only issue in the case, there could be no argument that the Section 5 issue is merely collateral to decision of some state-law question, and the case would squarely present the question whether state courts have concurrent jurisdiction over non-collateral Section 5 claims.

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[12] The plaintiffs also sought a declaration that the districts violated the constitutional one person, one vote standard. 586 So. 2d at 830.

The request for the second declaration appears on its face to involve a question of state law. Yet, even if it does, the Section 5 issue in this case is not "collateral" to the state-law question. Indeed, the question of how Sections 37-7-611 and Section 52 of the Uniform School Law co-exist arises only if it is determined that the repeal of Section 37-7-611 was not effective, *i.e.*, the repeal was not precleared. Thus, the state-law question concerning whether the two statutes are consistent with each other appears, if anything, to be collateral to the Section 5 question in this case.

4. We have substantial doubt that the Mississippi Supreme Court's holding that it has concurrent jurisdiction over Section 5 coverage cases is correct. As this Court has repeatedly held, "the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Tafflin* v. *Levitt*, 493 U.S. 455, 458 (1990). State courts are thus "presumptively competent[] to adjudicate claims arising under the laws of the United States." *Ibid.* That presumption can be rebutted only "if Congress affirmatively ousts the state courts of jurisdiction" in one of three ways: "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 478 (1981).

Section 5 of the Voting Rights Act provides that "[any action] under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court." 42 U.S.C. 1973c. That language mandates that jurisdiction over "any action under" Section 5 be vested in three-

judge federal courts. In our view, exercise of state court jurisdiction over such claims is accordingly precluded.[13]

That conclusion is reinforced by the congressional purposes underlying Section 5. A Section 5 coverage case always draws into question the validity of a state law. Because resolution of the state law's validity involves "a potential for substantial interference with governmental administration," *Allen*, 393 U.S. at 562, Congress determined that such actions should be decided in the first instance by a panel of three federal judges, with direct appeal to this Court. Only by providing for such a direct appeal could Congress assure that the validity of the state statute would be determined finally and authoritatively.

To permit Section 5 cases to be brought in state court would defeat that purpose. Even after a state trial court, intermediate appellate court (if any), and state supreme court passed on the Section 5 issue, the preclearance status of the state statute would remain open in subsequent litigation in federal court, since decisions of state courts on federal questions are not binding on the federal courts.[14] See, *e.g.*, *Stand-*

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[13] In *Allen* v. *State Bd. of Elections*, 393 U.S. 544 (1969), the Court concluded that that there are three kinds of actions under Section 5—actions brought by a State concerning the constitutionality of Section 5, actions brought by the State to determine whether a particular statute has a discriminatory purpose or effect, and actions brought by a private plaintiff to determine whether a statute is enforceable. 393 U.S. at 558-560. The Court determined that all three types of actions require a three-judge court, but only the first two must be litigated in the District Court for the District of Columbia.

[14] Because the state court's resolution of the Section 5 question would not be binding on federal courts, to permit state courts to exercise concurrent jurisdiction over Section 5 cases also threatens "to breed conflicts between the state courts and

ard Oil Co. v. *Johnson*, 316 U.S. 481, 483 (1942). Accordingly, another plaintiff could bring an identical challenge to the same state statute in federal court, and ultimate decision on the statute's validity would be postponed until this Court decided the question on appeal. If this Court reviewed the state court's resolution of the Section 5 question on a writ of certiorari, a final resolution would be obtained without recourse to federal district court. But that resolution would be dependent on this Court exercising its discretion in granting a petition for a writ of certiorari and would defeat Congress's purpose in providing for direct review in this Court by appeal, thus guaranteeing authoritative resolution of the validity of the state statute.

The conclusion that Congress granted exclusive federal jurisdiction over Section 5 cases to three-judge federal courts is not at odds with decisions of this Court holding that state courts possess concurrent jurisdiction over other federal claims. For example, in *Yellow Freight System, Inc.* v. *Donnelly*, 494 U.S. 820 (1990), the Court held that state courts have concurrent jurisdiction over Title VII claims. Unlike the mandatory language of Section 5 ("any action under this section shall be heard and determined by a court of three judges"), the Title VII jurisdictional provision merely confers jurisdiction on federal district courts by providing that "[e]ach United States district court * * * shall have jurisdiction of actions brought under this subchapter." 42 U.S.C. 2000e-5(f)(3). Similarly, in *Tafflin* v. *Levitt*, 493 U.S. 455 (1990), the Court held that state courts have concurrent jurisdiction over civil RICO claims. The jurisdictional provision at issue there was even more clearly permissive than that in Title VII, pro-

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the federal district courts sitting within the States." *Hathorn* v. *Lovorn*, 457 U.S. at 271 (Rehnquist, J., dissenting).

viding that "[a]ny person injured in his business or property * * * may sue therefor in any appropriate United States district court." 18 U.S.C. 1964(c). In contrast to the civil RICO statute, Section 5 provides that cases brought thereunder "shall" be heard by a three-judge court and provides for direct review in this Court. To permit concurrent state-court jurisdiction would both contravene the express language of the statute and disserve Congress's purpose of providing for authoritative and speedy decision concerning the validity of state laws brought into question in Section 5 litigation.

5. Despite our doubts concerning the correctness of the Mississippi Supreme Court's jurisdictional holding, however, the issue does not appear to warrant further review at this time. As noted above, that court appears to be the only post-*Hathorn* court to reach the issue of whether there is state court jurisdiction over Section 5 coverage claims that are not merely collateral to state-law issues.[15] Even as to that issue, the court's decision is not without ambiguity concerning whether, in its view, it was exercising general concurrent jurisdiction over Section 5 questions, or whether instead it was relying on *Hathorn*'s holding that state courts have jurisdiction to decide Section 5 coverage issues that are collateral to state-law claims. Finally, neither of the parties has briefed or argued the jurisdictional issue in this case.

If certiorari were denied in this case, it would have the effect of leaving intact the Mississippi Supreme Court's holding that the repeal of Section 37-7-611

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[15] The three-judge federal court in *Dupree* v. *Moore* agreed with the Mississippi Supreme Court's jurisdictional holding in this case, but appears to have rested its discussion on the assumption that the state court's exercise of jurisdiction here was merely collateral and thus governed by *Hathorn*. See 90-1977 J.S. App. 14a-15a.

was precleared. As explained above and in our submission in *Dupree* v. *Moore*, we believe that that holding was erroneous, especially in light of this Court's subsequent decision in *Clark* v. *Roemer*. Nonetheless, that fact alone does not in our view warrant plenary consideration of this case. For the Mississippi Supreme Court's decision here would not preclude further judicial consideration of the claim that Section 37-7-611 should be given effect, even as to the specific expansion of school district boundaries at issue in this case.

First, the decision in this case would not preclude resolution of the same question in litigation between other parties—or in an enforcement action brought by the Attorney General—in federal court.[16] As the Court stated in *Hathorn*, "[p]ersons dissatisfied with a state court's * * * resolution of a § 5 issue in proceedings involving other parties * * * are likely to be able to litigate the issue anew in federal court." *Hathorn* v. *Lovorn*, 457 U.S. at 269 n.23. As noted above, a federal court is not generally bound as a matter of precedent by a state court's resolution of the Section 5 question.

Second, if the substantive Section 5 issue in this case should come before the Mississippi courts again, the precedential weight to be accorded the decision here would be in doubt. Since the decision in this case predated this Court's decision in *Clark* v. *Roemer* by six months, the Mississippi courts would be obligated to reconsider the conclusion in this case in light of the subsequent, and in our view controlling, decision of this Court in *Clark*.

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[16] In fact, the same controversy over the boundaries of the Greenville school district is already at issue in a case pending in federal district court. See *Nickles* v. *Western Line Consol. School Dist.*, No. GC90-45-B-O (N.D. Miss. filed Feb. 22, 1990).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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